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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DESTINY TROTTER et al, Defendants and Appellants.	B283549 (Los Angeles County Super. Ct. No. GA100441)

APPEAL from a judgment of the Superior Court of Los Angeles County, Suzette Clover, Judge. Affirmed as modified.

John F. Schuck for Defendant and Appellant Destiny Trotter.

Rachel Varnell for Defendant and Appellant Donald Trotter.

Heather J. Manolakas for Defendant and Appellant Daven Trotter.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Marc A. Kohm and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant-siblings Destiny, Donald, and Daven Trotter appeal their convictions for attempted burglary. Defendants argue that the trial court abused its discretion in denying their Romero motions. Destiny and Donald assert that the trial court violated the constitutional prohibition against cruel and unusual punishment in sentencing them to 40 and 35 years, respectively. Daven argues his 9-year sentence should be reversed because the trial court improperly admitted prior bad act evidence regarding a similar attempted burglary. Destiny and Donald also assert that the abstracts of judgment should be amended to reflect 154 days of presentence conduct credit. We agree the trial court erred in calculating Destiny's and Donald's presentence credit and direct the superior court to modify the abstracts of judgment so that each receives 154 days total presentence conduct credit. We affirm on all other grounds.

FACTS AND PROCEDURAL BACKGROUND

1. Attempted Burglary

Defendants Destiny, Donald, and Daven Trotter are siblings in their 20s. On the evening of January 18, 2017, defendants attempted to burglarize a home, which at that time, was occupied by the elderly woman who lived there. Two of the defendants approached the victim's home, repeatedly rang the doorbell, looked in through the windows using a flashlight, broke the deadbolt lock on the exterior side gate, circled to the back of the home, and attempted to break in. In front of the home, the third defendant waited in the idling getaway car. The victim called police, who saw defendants speed off in the getaway vehicle outside the victim's home and apprehended them a block away. Donald was in the driver's seat. The vehicle was

registered to Daven and had paper plates. Defendants denied involvement in the attempted burglary.

2. Charges

The People charged defendants with attempted first degree burglary with a person present. The information alleged that Destiny had been convicted of three serious and/or violent felonies within the meaning of the Three Strikes Law, had been convicted of three no-probation felonies, had served three prior prison terms, and had suffered three prior serious felony convictions for first degree burglary.

The People alleged Donald had been convicted of two serious and/or violent felonies within the meaning of the Three Strikes Law, had served two prior prison terms, and had suffered two prior serious felony convictions for first degree burglary.

The information also alleged Daven had been convicted of one serious and/or violent felony within the meaning of the Three Strikes Law, had been convicted of a no-probation felony, had served a prior prison term, and had suffered a prior serious felony conviction for first degree burglary.

3. Rejected Plea Deal

On April 20, 2017, the People offered defendants a package plea deal: 12 years for Destiny and 7 years each for Donald and Daven. Defendants decided not to accept the plea deal.

4. Trial

On May 1, 2017, trial commenced. The prior convictions were bifurcated for a separate trial. At trial, the jury heard testimony from the victim as well as the investigating and arresting police officers. The court also admitted evidence of uncharged prior conduct from 2015 by Destiny and Daven. In June 2015, Destiny approached witness Frank W.'s house and

knocked on his door. When Frank W. answered, Destiny seemed startled and asked if "Joe McKinsey" lived there. Frank W. testified that he replied no, and Destiny turned around and jogged back to a black sedan parked in front of the house. Frank W. testified there was a driver in the car and that Destiny went to the front passenger seat.

Frank W. called the police to report the suspicious behavior. Police arrived to his home within ten minutes of his call, and took Frank W. to the location where a black sedan matching the description he provided had been stopped by police. Destiny, Daven, and another man were in the car. Frank W. identified Destiny as the woman who knocked on his door. Frank W. also identified the sedan by its appearance and his memory of the first digit on the license plate. During police interrogation that followed, Destiny denied knocking on Frank W.'s door and Daven claimed to be asleep in the car the whole time.

The jury found defendants guilty of attempted first degree burglary of the elderly woman's home.[1] In a bifurcated proceeding, the court found defendants' prior conviction allegations to be true.

5. Sentencing

Prior to sentencing, defendants made *Romero* motions, requesting the court to strike one or more of their prior respective strikes. We discuss the contents of their individual motions below. The court denied all three *Romero* motions.

The court sentenced Destiny to an aggregate sentence of 40 years to life. This was composed of a base sentence of 25 years to life (pursuant to the Three Strikes law), plus 15 years on the three prior serious felony convictions. The trial court awarded

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[1] The jury did not make a person present finding.

Destiny a total of 186 days custody credit (155 days of actual custody and 31 days of conduct credit).

The trial court sentenced Donald to an aggregate sentence of 35 years to life: 25 years to life under the Three Strikes law and 10 years on the two prior serious felony convictions. The trial court awarded Donald a total of 186 days custody credit (155 actual custody and 31 conduct credit).

The trial court sentenced Daven to the low term of two years (doubled pursuant to the Three Strikes law) and an additional five years on the prior serious felony conviction. Daven's aggregate sentence was nine years. The court gave Daven 184 days custody credit (92 actual custody and 92 conduct credit).

DISCUSSION

Defendants all argue that the trial court abused its discretion in denying their *Romero* motions. Destiny and Donald assert that the trial court violated the constitutional prohibition against cruel and unusual punishment. Daven argues the trial court improperly admitted prior bad act evidence. Destiny and Donald also assert that the abstracts of judgment should be amended to reflect 154 days of presentence conduct credit. We address each contention below.

1. Romero Motions

Defendants contend the trial court abused its discretion by denying their *Romero* motions to dismiss their prior strikes for residential burglary. In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504 (*Romero*), the California Supreme Court explained that under Penal Code section 1385, subdivision (a), a trial court may, in the furtherance of justice, strike or vacate an allegation or finding under the Three Strikes law that a

defendant previously suffered a conviction for a serious and/or violent felony.[2] In deciding whether to strike the prior conviction, the court considers "both of the constitutional rights of the defendant, and the interests of society represented by the People." (*Id.* at p. 530, quotations and italics omitted.)

In *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), the Supreme Court held: "in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to . . . section 1385[, subdivision](a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If . . . it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth." (*Id.* at p. 161.)

We review the trial court's denial of defendants' *Romero* motions for abuse of discretion. (*Romero, supra,* 13 Cal.4th at p. 504.) The key question on that review is whether the ruling in question falls "outside the bounds of reason." (*Williams, supra,* 17 Cal.4th at p. 164.) The burden is on the party attacking the sentence to show irrationality or arbitrariness. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) In the absence of that showing, the presumption arises that the trial

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[2] All subsequent citations are to the Penal Code unless indicated otherwise.

court engaged in a proper exercise of discretion to achieve legitimate sentencing objectives. (*Id.* at pp. 977–978.)

In *People v. Carmony* (2004) 33 Cal.4th 367, 378, the Supreme Court explained: The "trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances." "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he [or she] squarely falls once he [or she] commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Ibid.*)

We address each defendant's motion in turn.

a. Destiny

Destiny's counsel argued that her conduct, which was nonviolent, did not warrant a 40-years-to-life prison term, and that a 17 year sentence would be sufficient to punish her and prevent recidivism. Counsel asserted that the fact the convictions were all recent indicated there was an opportunity to rehabilitate Destiny.

The trial court agreed with the temporal proximity but found it inculpatory. The court opined: "The first was in 2014, and the next two were two separate residential burglaries in 2015. And all three were residential burglaries of the same modus operandi as this one. There is just no basis at all, in my view, to strike the prior strikes. . . . [W]hen you look at the prior offenses and what they were for, how close in time they are, and also you look at this particular crime where you have a

particularly vulnerable victim. She's in her 80's and is home alone, late at night. She experiences aggressive banging on her door, the rapid and repeated ringing of the doorbell, and hearing the crashing sound of her gate lock being opened. I just think there was the threat of great violence, great bodily harm and even death, potentially, and that it was just a particularly callous act."

On appeal, Destiny argues that because she is only 26 years old and three priors were committed in a short three-year period, the trial court abused its discretion in denying her Romero motion. She asserts that when her background and overall criminal record are considered, "it is clear that, although at the very edge, she does not yet fall within the spirit of the 'strikes' laws." Destiny explains that although her current offense was serious, she and her brothers "were unarmed and no one was hurt. Nothing was lost." Destiny avers that when compared to the misdeeds of violent recidivists in California, her offense did not warrant the harsh punishment. She also notes that the People's pretrial offer of 12 years in prison reflects the People's view that her present offense did not warrant an extreme 40-years-to-life sentence.

We conclude that the trial court's decision to deny Destiny's *Romero* motion was not "so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra,* 33 Cal.4th at p. 377.) Although Destiny was only 26 years old when she committed the current offense, she had an extensive criminal history of committing residential burglaries. In December 2014, November 2015, and December 2015, Destiny suffered convictions for burglary in the first degree. Residential burglaries are uniquely dangerous because of the violence they

might precipitate. "Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence." (*People v. Thorn* (2009) 176 Cal.App.4th 255, 264 (internal quotation marks omitted).) Nor does the record reflect impetuosity; rather, she successfully solicited her brothers participation in the past.

The record shows the court was aware of its discretionary authority to strike a prior felony conviction allegation in this case. It also shows the court conducted a thorough analysis of the relevant factors as mandated by the California Supreme Court in *People v. Williams, supra,* 17 Cal.4th 148. We find no error.

b. Donald

Donald moved to dismiss one of this prior strikes for residential burglary committed in 2013 and 2014, stressing that he was only 23 years old when he committed the present crime, had no violent felony convictions, was in the process of obtaining his general education degree, and was the father of three children. He requested the court to strike one strike and sentence him to the high term doubled, plus 10 years for his two priors, for a total sentence of 16 years.

The trial court denied Donald's motion, concluding that "having considered all the reasons why this motion should be granted, there just really aren't any. [Donald's] two prior strike convictions were recent in time. One was in 2013 and the other in 2014. In fact, . . . [Donald] was on parole at the time that he

committed this offense. And all three of the offenses are of the same nature in that they're all first degree residential burglaries. They all have the potential of great violence." The court reiterated that the elderly victim, who was home alone and armed with a gun, was particularly vulnerable and shaken up by the attempted burglary. The court also again noted that residential burglary had the potential for great violence and bodily harm.

On appeal, Donald reiterates the argument he made below. He highlights the fact that he and his siblings were unarmed during the attempted burglary. Donald asserts that because he would still receive a hefty sentence if the court struck one of his priors, the court abused its discretion in denying his Romero motion.

We disagree. The court provided a reasoned analysis that Donald's sentence was in the spirit of the Three Strikes Law given his recidivist tendencies to commit residential burglaries. Like with Destiny's motion, the trial court observed that residential burglary has the "potential for great violence." And it noted Defendant's callousness to commit another while on parole. We find no abuse of discretion.

c. Daven

Daven sought to strike his 2014 conviction for first-degree burglary, which was committed three years before his current conviction shortly after he turned 18. He argued that he was young, immature, and negatively influenced by his older siblings. Additionally, Daven was willing to accept a plea deal but the prosecution would not extend a separate offer to only Daven.

Although the court agreed Destiny had influenced Daven, the trial court denied his motion because this was the second

time defendant was invovled in a residential burglary, which was a serious and dangerous crime. The court stated that defendant "has engaged in a pattern of violent conduct, which indicates that he's a danger to society."

Again, we conclude the trial court did not abuse its discretion in denying the *Romero* motion. We acknowledge Daven's youth, but we also observe that the trial court found Daven's youth was outweighed by the "truly serious" nature of the crime in which Daven had a pattern of engaging. The court noted how harrowing the attempted burglary was for the elderly victim. The court reiterated that in all residential burglaries, there is "the possibility of great violence and great bodily injury." The record again shows the court was aware of its discretionary authority to strike a prior felony conviction, shows the court conducted a thorough analysis of the *Williams* factors, and did not abuse its discretion in denying the motion.

2. Destiny and Donald's 40 and 35 Year Sentences Do Not Constitute Cruel and Unusual Punishment

Donald and Destiny argue that their sentences of 35 years to life and 40 years to life, respectively, are grossly disproportionate punishments for the attempted burglary offense such that the sentences violate the Eighth Amendment and the California Constitution.

"The Eighth Amendment prohibits imposition of a sentence that is 'grossly disproportionate' to the severity of the crime." (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1087.) In California, a punishment violates the state constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*People v. Uecker* (2009) 172 Cal.App.4th 583, 600.)

Successful proportionality challenges are " 'exceedingly rare' " in noncapital cases. (*Ewing v. California* (2003) 538 U.S. 11, 20–21 [defendant's sentence of 25 years to life for felony theft of golf clubs under the Three Strikes Law (prior robbery and burglary felonies) did not violate Eighth Amendment].) "In the rare case where gross disproportionality can be inferred from (1) the gravity of the offense and harshness of the penalty, the court will consider (2) sentences imposed for other offenses in the same jurisdiction and (3) sentences imposed for commission of the same crimes in other jurisdictions. [Citation.] '[I]t is only in the rare case where a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality that the second and third criteria come into play.' " (*Haller, supra,* 174 Cal.App.4th at p. 1088.)

Here, a gross disproportionality cannot be inferred when looking at the offense and penalty. This attempted burglary was committed late at night, when the homeowner was likely to be home. Defendants worked as a team to identify the target, approach, and break into the home. They utilized a getaway driver and a vehicle without license plates to ensure their escape and to avoid apprehension. The elderly victim experienced aggressive banging on her door, rapid and repeated ringing of her doorbell, and the crashing sound of her exterior gate lock being opened.

Additionally, Destiny and Donald both had multiple previous convictions for residential burglary. Despite prison time served for these priors, they continued to burglarize homes. This burglary demonstrates that they have not reformed their criminal behavior. And worse, they have influenced their younger sibling to engage in the same dangerous criminal

activity. The habitual offender statutes that enhanced Destiny's and Donald's sentences are directed at this very kind of repetitive criminal behavior.

Such "habitual offender statutes have long withstood the constitutional claim of cruel or unusual punishment." (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1413 [upholding 61-year sentence for a three strike offender convicted of two counts of burglary], overruled on other grounds in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8.) In discussing recidivist statutes, the Supreme Court of the United States has stated, "The purpose of a recidivist statute . . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Rummel v. Estelle* (1980) 445 U.S. 263, 284–285.)

Recidivism in the commission of multiple felony burglaries poses a manifest danger to society justifying the imposition of longer sentences for each subsequent offense. While defendants' criminal histories are not violent, their actions have constituted grave threats to human life and safety. We conclude that their

sentences are not so grossly disproportionate as to shock the conscience.

3. The Court Did Not Abuse Its Discretion in Admitting Evidence of the Prior Attempted Home Burglary

Joined by Destiny, Daven argues the trial court improperly admitted evidence of the June 6, 2015 attempted burglary because it was not sufficiently similar to the charged offense and the probative value of the evidence was outweighed by its prejudicial effect. Daven's challenge involves a two-part inquiry: (a) does the evidence fall under an exception to the ban on character evidence under Evidence Code section 1101, and (b) is the evidence admissible under Evidence Code section 352. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328–1329 (*Foster*).)

a. Evidence Code Section 1101

Under Evidence Code section 1101, subdivision (a), evidence of specific instances of uncharged prior conduct is inadmissible to prove that a person acted in conformity with that conduct. However, that statute permits a court to admit character evidence to prove intent, identity, or a common plan, "only if the charged and uncharged crimes are sufficiently similar to support a rational inference of . . . common design or plan, [identity] or intent. [Citation.]' [Citation.]" (*Foster, supra,* 50 Cal.4th at p. 1328; see Evid. Code, § 1101, subd. (b).)

"[T]he degree of similarity required for cross-admissibility ranges along a continuum, depending on the purpose for which the evidence is received. The least degree of similarity is required to prove intent. A higher degree is required to prove common plan, and the highest degree to prove identity." (*People v. Scott* (2011) 52 Cal.4th 452, 470.) "[E]vidence of uncharged misconduct must demonstrate not merely a similarity in the

results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations." (*Foster, supra,* 50 Cal.4th at p. 1328 (internal citations and quotation marks omitted).) "[E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) Evidence of "the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Ibid.*)

We conclude the trial court did not abuse its discretion when it admitted evidence of the uncharged June 6, 2015 attempted burglary to show intent and common scheme or plan. The uncharged conduct was sufficiently similar to support an inference that defendants had a common plan of committing or attempting to commit burglaries on residences together. Both the charged offense and the 2015 uncharged offense (described in the fact section above) involved defendants driving to the home they intended to burglarize, knocking on the victim's door, and having a getaway driver wait in the car in front of the victim's home. When caught by police shortly after both attempted burglaries, both Destiny and Daven provided police with similar explanations for being the vehicle and denied involvement in a crime.

Daven's citations to cases that use uncharged acts to prove identity are inapt here. Identity was not at issue: in the uncharged case, the witness Frank W. identified Destiny as the

woman who knocked on the door and identified the car (including the license plate) in which Destiny and Daven were stopped. The trial court did not abuse its discretion in admitting the uncharged act evidence to show defendants' intent and common scheme or plan.

b. Evidence Code Section 352

"If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant's intent [or] common plan, . . . the trial court then must consider whether the probative value of the evidence 'is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)' [Citation.] 'Rulings made under [Evidence Code sections 1101 and 352] are reviewed for an abuse of discretion. [Citation.]' [Citation.] 'Under the abuse of discretion standard, "a trial court's ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citation.]" (*Foster, supra,* 50 Cal.4th at pp. 1328–1329.) "Evidence is prejudicial within the meaning of Evidence Code section 352 if it ' "uniquely tends to evoke an emotional bias against a party as an individual" ' [citation] or if it would cause the jury to ' " 'prejudg[e]' a person or cause on the basis of extraneous factors." ' [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 475.)

Here, the uncharged act was recent and similar to the attempted burglary at issue at trial. The uncharged act had significant probative value to show defendants' intent in

approaching the victim's house in the present case, and a common plan or scheme for committing residential burglaries.

This probative value was not outweighed by any of the concerns listed in Evidence Code section 352. The testimony regarding the uncharged act did not consume undue time or court resources, occupying only 33 of the 500 pages of reporter's transcript. There is nothing in the record to indicate the uncharged act was likely to confuse, mislead, or inflame the passions of the jury. The 2015 incident was no more serious than the charged offense and did not involve violence.

Furthermore, jury instructions directed the jury on how to properly use this evidence. The court instructed the jury that they may not conclude from the evidence that defendants had a bad character or that they were disposed to commit crime. The court also informed the jury that it may only consider the evidence for the limited purpose of identity, intent, or common plan. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) The court did not abuse its discretion in admitting the 2015 uncharged similar conduct.

4. The Abstracts of Judgment Must Be Amended to Reflect 154 Days of Presentence Conduct Credit for Defendants Donald and Destiny

The trial court awarded defendants Destiny and Donald total of 186 days custody credit each, which was composed of 155 days of actual custody and 31 days of conduct credit. The trial court awarded defendants 31 days of conduct credit, reflecting 20

percent of their actual days in custody.[3] On November 17, 2017, the trial court denied Destiny's ex parte motion to recalculate her presentence custody credits, stating that defendants' presentence custody credits were properly limited to 20 percent based on defendants' prior strike conviction.

Destiny and Donald argue they are entitled to 154 days of presentence custody credit under section 4019. The People concede this point and we agree. Pursuant to section 4019, subdivision (f), Destiny and Donald are entitled to two days of presentence conduct credit for every two days of actual time spent in custody. Thus, they are each entitled to 154 days of presentence conduct credit in addition to their time served credit, for a total of 309 days of credit. We remand for the trial court to amend their abstracts of judgment accordingly.

DISPOSITION

The judgment is modified to reflect that Destiny and Donald each have 154 days of presentence conduct credit in addition to the 155 days of time served credit, for a total of 309 days of credit. The superior court is directed to modify the abstracts of judgment accordingly and to forward a certified copy

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[3] In allotting defendants their good time credit, it appears that the trial court relied on Penal Code section 667, subdivision (c)(5), which limits in-prison conduct credits to 20 percent for three-strikers. This statute applies only to in-prison credits and thus did not limit presentence custody credits.

of the amended abstract to the Department of Corrections and Rehabilitation. We affirm the judgments on all other grounds.

RUBIN, Acting P. J.

WE CONCUR:

GRIMES, J.

GOODMAN, J.*

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.